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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

RICHARD EDMOND RUSSELL, JR.,)	Case No. CV 14-01976 (AS)
)	
Plaintiff,)	MEMORANDUM OPINION AND
)	
v.)	ORDER OF REMAND
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

PROCEEDINGS

On March 25, 2014, Plaintiff filed a Complaint seeking review of the denial of his applications for Disability Insurance Benefits and Supplemental Social Security Income. (Docket Entry No. 3). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 8, 11). On August 6, 2014, Defendant filed an Answer along with the Administrative Record ("AR"). (Docket Entry Nos. 13-14). The parties filed a Joint Stipulation

1 ("Joint Stip.") on November 7, 2014, setting forth their respective
2 positions regarding Plaintiff's claims. (Docket Entry No. 19).

3
4 The Court has taken this matter under submission without oral
5 argument. See C.D. Cal. L.R. 7-15; "Order Re: Procedures In Social
6 Security Case," filed March 26, 2014 (Docket Entry No. 7).

7
8 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

9 On August 29, 2011, Plaintiff, formerly employed as a nursing
10 assistant, home health care provider, and airplane detailer (see AR 38,
11 146), filed applications for Disability Insurance Benefits and
12 Supplemental Social Security Income, alleging disability since August
13 20, 2003. (See AR 15, 37, 71-72, 126-133). At the commencement of the
14 administrative hearing on October 31, 2012, Plaintiff waived his
15 application for Disability Insurance Benefits, and elected to proceed
16 solely with his application for Supplemental Social Security Income,
17 alleging a disability since August 29, 2011. (See AR 37). The
18 Administrative Law Judge ("ALJ"), Jan Donsbach, heard testimony from
19 Plaintiff and vocational expert Sandra Trost. (See AR 37-53). On
20 November 29, 2012, the ALJ issued a decision denying Plaintiff's
21 application. The ALJ determined that Plaintiff had a severe impairment
22 -- "residual fractures of the fibular and humerus" -- but found that
23 Plaintiff was not disabled within the meaning of the Social Security
24 Act. (See AR 15-22).

25 Plaintiff requested that the Appeals Council review the ALJ's
26 decision. (AR 7-11). The request was denied on February 22, 2014. (AR
27 1-5). The ALJ's decision then became the final decision of the
28 Commissioner, allowing this Court to review the decision. See 42 U.S.C.
§§ 405(g), 1383(c).

1 **PLAINTIFF'S CONTENTIONS**

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3 Plaintiff alleges that the ALJ erred in failing to properly: (1)
4 assess the medical evidence in determining Plaintiff's residual
5 functional capacity; and (2) assess Plaintiff's credibility. (See Joint
6 Stip. at 3-6, 10-13, 15-17).

7 **DISCUSSION**

8
9 After consideration of the record as a whole, the Court finds that
10 Plaintiff's first claim of error warrants a remand for further
11 consideration. Since the Court is remanding the matter based on
12 Plaintiff's first claim of error, the Court will not address Plaintiff's
13 second claim of error.

14 **A. The ALJ Failed to Properly Assess the Medical Evidence**

15
16 The ALJ found that Plaintiff had the following RFC: the ability to
17 perform light work¹ "except no more than occasional overhead reaching
18 dominant right upper extremity." (See AR 22). In making this
19 determination, the ALJ stated that he had afforded "great weight" to the
20 "findings of the consultative examiner and DDS medical consultants."
21 (AR 20). As set forth below, however, the ALJ rejected the findings of
22 the consultative examiner without providing clear and convincing reasons
23 and did not state the reasons for his reliance on the findings made by
24 the DDS medical consultant.

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¹ "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. §§ 404.1567(b) and 416.967(b).

1 Consultative Examiner John Chung, M.D.

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3 The ALJ summarized the November 29, 2011 findings of the
4 consultative examiner, John Chung, M.D., following an orthopedic
5 evaluation, including X-rays. (See AR 18, 254-63). Dr. Chung diagnosed
6 Plaintiff with: "Internal derangement of the right shoulder with
7 fracture"; "Probable adhesive capsulitis of the right shoulder";
8 "Derangement of the right hip as well as fracture" and "Internal
9 derangement of the right knee, rule out fracture or torn meniscus," (AR
254); and made the following functional assessment:

10 Based on the objective finding, he is not able to use the
11 right upper extremity to perform any task at or above
12 shoulder level. He had difficulty doing any pulling or
13 pushing type of activity using the right upper extremity.
14 There is no limitation for the left upper extremity. There
15 is a probability that he has problem with his right knee
16 and this needs to be ruled out, therefore, he will have
17 limitation of standing or walking capacity. In an 8-hour
18 day, he is able to stand and walk 2 hours and sit for 6
19 hours. He is not able to lift and carry using the right
20 upper extremity. He has postural limitation. He also had
21 environmental limitation because of his writing problem.
22 At the present time, I feel that he has difficulty in doing
23 any type of physical activity on his right upper and lower
24 extremity. Further diagnostic evaluation is indicated.

25
26 (AR 258).

27 Although the ALJ purported to afford great weight to Dr. Chung's
28 opinions, the ALJ's determination on Plaintiff's RFC actually gave Dr.
Chung's opinions very little weight. Indeed, the ALJ did not
specifically address Dr. Chung's opinions as to Plaintiff's postural and
environmental limitations.

1 The ALJ rejected Dr. Chung's opinion about Plaintiff's ability to
2 lift and carry was "excessively restricted" based on: (a) Plaintiff's
3 "admission that he can carry small bags of groceries and perform small
4 chores, as noted in his Exertional Activity Questionnaire" (see AR 18,
5 citing AR 163-65 [In an Exertion Questionnaire dated October 22, 2011,
6 Plaintiff wrote, "I can carry a small bag of groceries" and "I can do
7 small chores"]); and (b) Plaintiff's testimony at the hearing that he
8 takes out the trash, does a little walking and recycles bottles and cans
9 (see AR 18, 43-44). However, these reasons do not meet the clear and
10 convincing standard.

11 First, the ALJ mischaracterized Plaintiff's statements, since
12 Plaintiff did not claim that he could perform daily activities on an
13 unlimited basis. (See AR 164-65 [In the Questionnaire, Plaintiff wrote,
14 "I can carry a small bags (sic) of groceries, because of pain in
15 shoulder I can not (sic) do this often" and "I can do small chores if it
16 doesn't involve using my right shoulder (sic) or standing for any length
17 of time."]); AR 43-44 [At the hearing, Plaintiff testified, "I usually
18 try to get out and do a little bit of walking, I recyle when I can" and
19 "I take out the trash."]. Second, Plaintiff's statements about his
20 ability to perform daily activities generally was not inconsistent with
21 Dr. Chung's opinion because Plaintiff could have performed such
22 activities with his left hand (see AR 45), the use of which Dr. Chung
23 did not restrict. Third, Plaintiff's ability to perform certain daily
24 activities, such as carrying groceries, taking out the trash, walking,
25 and recyling, did not support the adverse credibility finding as to Dr.
26 Chung. See Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007).

27 The ALJ also rejected Dr. Chung's opinions based on Plaintiff's
28 testimony that his pain is relieved with medication (see AR 18). This
reason was also not clear and convincing. The ALJ does not cite to any
part of the record where Plaintiff testified that his pain was relieved
with medication and the record does not reflect that Plaintiff testified
his pain was totally relieved with medication. At the hearing,

1 Plaintiff testified that medication and a heating pad "eases the pain a
2 little bit" on his right shoulder and hip, and that with medication his
3 right knee pain goes down to a level of 3 (see AR 47-48). Moreover, in
4 the Exertion Questionnaire, Plaintiff stated that he could not carry
5 things very far unless he first takes pain medications. (See AR 164).
6 The record does not substantiate the ALJ's characterization about
7 Plaintiff's pain relief.

8 The final reason given by the ALJ for discrediting Dr. Chung's
9 opinions was the absence of evidence of ongoing medical treatment, the
10 problems with certain records suggesting Plaintiff is disabled and/or
11 temporarily unemployable, and the allegedly infrequent and irregular
12 nature of Plaintiff's treatment (see AR 18-19). Contrary to the ALJ's
13 assertion (see AR 18-19), however, it appears that at least some records
14 concerning Plaintiff's disability and/or temporary unemployability were
15 signed by an acceptable medical source. (See AR 303-05). In any event,
16 the ALJ failed to explain how Dr. Chung's opinions about Plaintiff's
17 limitations were affected by such matters. The case relied on by
18 Defendant to support the ALJ's reason (see Joint Stip. at 7, citing Fair
19 v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989) relates only to a claimant's
20 credibility determination.²

21 Thus, the Court finds that the ALJ erred in his assessment of the
22 examining physician's opinions (see Joint Stip. at 5, 10), by failing to
23 provide "clear and convincing" reasons for rejecting Dr. Chung's
24 testimony. See Lester v. Chater, supra, 81 F.3d at 831 ("[T]he
25 Commissioner must provide 'clear and convincing' reasons for rejecting
26 the uncontradicted opinion of an examining physician.").

27 ² The Court will not consider reasons for discounting Dr.
28 Chung's opinions (see Joint Stipulation at 7) that were not given by the
ALJ in the Decision. See Pinto v. Massanari, 249 F.3d 840, 847-48 (9th
Cir. 2001); SEC v. Chenery Corp., 332 US 194, 196, 67 S.Ct. 1575, 91
L.Ed. 1995 (1947).

1 DDS Medical Consultant I. Kim:

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3 Although the ALJ purported to rely on the "opinions of the DDS
4 medical consultants," (see Joint Stip. at 4, 10), the ALJ did not
5 summarize or discuss any such opinions and, contrary to the ALJ's
6 assertion, the record reveals only one consultant who provided an opinion
7 regarding Plaintiff's functional limitations. A "Disability Determination
8 Explanation," (see AR 62-70), prepared by I. Kim on February 1, 2012
9 stated that Plaintiff had the following RFC for the period of August 1,
2012 to August 1, 2013:

10 Plaintiff had exertional limitations (Plaintiff could
11 occasionally lift and/or carry 20 pounds and could frequently
12 lift 10 pounds; Plaintiff could stand and/or walk about 6
13 hours in an 8-hour workday; Plaintiff could sit about 6 hours
14 in an 8-hour workday; Plaintiff could push and/or pull
15 unlimited); Plaintiff had postural limitations (Plaintiff
16 could occasionally climb ramps/stairs; Plaintiff could never
17 climb ladders/ropes/scaffolds; Plaintiff could frequently
18 balance, stoop, kneel and crouch; Plaintiff could never
19 crawl); Plaintiff has manipulative limitations (Plaintiff is
20 limited with his ability to use his right arm to reach in
21 front and/or laterally and overhead; Plaintiff can handle,
22 finger and feel unlimited); and Plaintiff does not have any
visual, communicative or environmental limitations.

23 (AR 67-68).

24
25 The ALJ failed to explain why he was giving this opinion such great
26 weight. See 20 C.F.R. §§ 404.1527(e)(2)(ii), 416.927(e)(2)(ii) ("Unless
27 a treating source's opinion is given controlling weight, the
28 administrative law judge must explain in the decision the weight given
to the opinions of a State agency medical or psychological consultant

1"); Lewin v. Schweiker, 654 F.2d 631, 634 (9th Cir. 1981) ("The
2 circuit courts have consistently recognized the need for full and
3 detailed findings of fact essential to the Secretary's conclusion.");
4 see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) ("The
5 opinion of a nonexamining physician cannot by itself constitute
6 substantial evidence that justifies the rejection of the opinion of
7 either an examining physician or a treating physician")(emphasis in
8 original). Moreover, as Plaintiff asserts and Defendant does not
9 dispute (see Joint Stip. at 4, 10), since I. Kim identified himself as
10 a "SDM" (which apparently is a substitute decision maker), it is not
11 clear that the ALJ was entitled to rely on his opinions. See 20 C.F.R.
12 §§ 404.1527(e)(2)(i), 416.927(e)(2)(i) ("State agency medical and
13 psychological consultants and other program physicians, psychologists
14 and other medical specialists are highly qualified physicians,
psychologists, and other medical specialists who are also experts in
Social Security disability evaluation.").

15 **B. Remand Is Warranted**

16
17 The decision whether to remand for further proceedings or order an
18 immediate award of benefits is within the district court's discretion.
19 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
20 useful purpose would be served by further administrative proceedings,
21 or where the record has been fully developed, it is appropriate to
22 exercise this discretion to direct an immediate award of benefits. Id.
23 at 1179 ("[T]he decision of whether to remand for further proceedings
24 turns upon the likely utility of such proceedings."). However, where,
25 as here, the circumstances of the case suggest that further
26 administrative review could remedy the Commissioner's errors, remand is
27 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);
28 Harman v. Apfel, supra, 211 F.3d at 1179-81.

1 Since the ALJ failed to properly evaluate the opinions of the
2 consultative examiner and the State Agency medical consultant, remand
3 is appropriate. Because outstanding issues must be resolved before a
4 determination of disability can be made, and "when the record as a whole
5 creates serious doubt as to whether the [Plaintiff] is, in fact,
6 disabled within the meaning of the Social Security Act," further
7 administrative proceedings would serve a useful purpose and remedy
8 defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir.
2014)(citations omitted).³

9
10 **ORDER**

11 For the foregoing reasons, the decision of the Commissioner is
12 reversed, and the matter is remanded for further proceedings pursuant
13 to Sentence 4 of 42 U.S.C. § 405(g).

14
15 LET JUDGMENT BE ENTERED ACCORDINGLY.

16 DATED: July 20, 2015

17
18 _____/s/
19 ALKA SAGAR
20 UNITED STATES MAGISTRATE JUDGE
21
22

23
24 ³ The Court has not reached any other issue raised by Plaintiff
25 except insofar as to determine that reversal with a directive for the
26 immediate payment of benefits would not be appropriate at this time.
27 "[E]valuation of the record as a whole creates serious doubt that
28 Plaintiff is in fact disabled." See Garrison v. Colvin, 759 F.3d 995,
1021 (2014). Accordingly, the Court declines to rule on Plaintiff's
claims regarding the ALJ's questions to the vocational expert (see Joint
Stip. at 5-6, 11) and the ALJ's assessment of Plaintiff's credibility
(see Joint Stip. at 11-13, 15-16). Because this matter is being
remanded for further consideration, these issues should also be
considered on remand.